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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-277

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

BOYD PETERS, ET AL.,
Respondents.

BRIEF OPPOSING WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

STATEMENT

The assertion of Petitioner that the Court of Appeals has held that the Civil Rights Act, ". . . makes agreements by Negroes unenforceable" (Pet. 1) finds no support in the opinion or proceedings below. To the contrary, the central issue, as stated in the opinion below (A. 19, p. 3) was whether the Petitioner had discriminated against the Respondents by forcing their retirement solely because of their race, in violation of 42 U.S.C.A., §2000e-2(a). The meaning of the Appeals Court opinion is that the perpetuation of an existing racial discrimination by an employer-bargaining unit contract is in violation of the Act, and resulting damages to employees are recoverable. On oral

argument, counsel properly answered the inquiry (Pet. 1) whether there was any way that this discriminatory agreement could have been made so as to be valid in the negative.

As summarized in the opinion below (A. 26), the Trial Judge found that the employer-union agreement resulted from previous discriminatory hiring policies, adversely affected the Respondents' status as employees and discriminated against them on the basis of race by carrying forward into the present and future effects of prior racial or discriminatory employment practices. Obviously, the entering into and enforcing of such a retirement agreement was in violation of 42 U.S.C.A., §2000e-2(a), and the Court so found.

It may shorten the work of the Court if Respondents briefly answer the contentions of Petitioner as set out in its

QUESTIONS PRESENTED

1. The right of freedom of contract is not impaired by a refusal to enforce a racially discriminatory agreement that violates Title VII of the 1964 Civil Rights Act, irrespective of whether the agreement was made by whites or blacks.

2.A. If a contract is in violation of Title VII of the Civil Rights Act, it matters not that it conforms with the Railway Labor Act, or was entered into in good faith by the employer. The opinion below (A. 30-33) fully answers this question.

B. If Petitioner has pointed any "opposite effects" in the discriminatory working agreement, we have failed

to find them in a careful reading of the entire Petition. Nevertheless, the action for damages by the Respondents for discrimination against them could not be affected by supposed benefits to them or others arising out of the same agreement.

C. As found by the Trial Court (A. 26) the agreement sought to perpetuate prior racially discriminatory employment practices of Petitioner, and was not based solely on the fact that white firemen had a prescribed retirement age of seventy (70), and black firemen an age of sixty-five (65) although this alone would suffice to establish racial discrimination.

D. The "promotion rule" offered the black firemen was rejected because it would have required automatic discharge of the firemen who failed to pass a test for promotion (R. 988), whereas the promotion rule for white firemen permitted them to flow back and forth from the rank of engineer to the rank of fireman (R. 775-776), and rather than being automatically discharged upon failing an examination, they were permitted to become "fixture firemen" and remain in the service of the company (R. 778). The tendered "promotion rule" was itself racially discriminatory.

3. The "unique arrangement" that permitted black firemen to remain in service as firemen without penalty was designed to prevent them from achieving promotion to engineer status, which they were offered only on pain of being automatically discharged if they failed the promotion test (R. 988). The unique arrangement worked well, for there had never been a black engineer on the Petitioner's system (R. 759).

Continuing our form of presentation, we next reply to the Petitioner's

REASONS FOR GRANTING THE WRIT

1. By the agreement the Petitioner sought to perpetuate prior racially discriminatory employment practices.

The pre-Act discrimination for which Respondents sought no relief (A. 68-69) was that arising out of pay and employment benefits and discrimination prior to the Act. The gravamen of the Respondents' complaint was against the agreement for carrying forward into the present and future discriminatory practices which affected the Respondents' right to work. We believe, as found by the Courts below, that the agreement operated to "freeze" the status quo of prior discriminatory employment practices that were forbidden in *Griggs* v. *Duke Power Company*, 401 U. S. 424, 28 L. Ed. 2d 158.

We take issue with the concluding remarks of Petitioner under this point questioning the Court of Appeals statement that the black retirees were no less competent for firemen's jobs than their white counterparts. The Defendant's witness Courtway testified that black and white firemen had frequently worked the same train and substituted for one another, even running overlapping routes (R. 757-758).

2. The Petitioner wholly failed to meet its burden of showing the discrimination to be job-related or a business necessity.

The racial impact of the employer-union contract having been shown and found by the Court, the burden of showing that the agreement was related to business necessity

or job performance was upon Petitioner.[1] The Petitioner contends that there was no need for firemen in freight service, and that a business necessity to retain only firemen who were capable of being promoted to engineers brought about the agreement that forced the black Respondents to retire five years earlier than the white firemen. The basis of the contention is not unlike that advanced by the white brotherhood in *Rolax* v. *Atlantic Coastline R. Co.* (4th Cir. 1951), 186 F. 2d 473. In that case the brotherhood procured a contract providing that only "promotable" men would be employed as firemen. Since no Negro firemen could be given an opportunity to stand examination for promotion to engineer, this effectively barred them from employment. The Court properly held that it is idle to attempt to justify such discrimination on grounds of operating efficiency.

When it is remembered that the Petitioner made the subject black firemen incapable of being promoted by offering a racially discriminatory promotion rule (supra, page 3), its efforts to justify the discrimination found in the agreement as a business necessity parallel those of the brotherhood in *Rolax*. It would indeed defeat the purposes of Title VII of the Civil Rights Act to permit a carrier to penalize its employees for refusing to accept a racially discriminatory system of promotion by thereafter contending that because the employees were not promotable, a business necessity existed for racial discrimination against them.

The distinction between the black and white firemen could not have been job-related (see testimony of Courtway referenced page 4, supra).

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1. *Griggs* v. *Duke Power Company*, 401 U. S. 424, 431, 432, 28 L. Ed. 2d 158, 164-165. *Moody* v. *Albemarle Paper Co.* (4th Cir. 1973), 474 F. 2d 134, 138; *United States* v. *Jacksonville Terminal Co.* (5th Cir. 1971), 451 F. 2d 418, 455-457.

3. The bargaining agency for the Respondents and the Petitioner could not enter a working agreement in violation of Title VII of the Civil Rights Act, nor are the civil rights of Respondents invaded by giving them relief from the invalid contract.

It is difficult to follow the argument of the Petitioner under its third reason for granting the writ. Its concern for maintaining the right of freedom of contract for blacks under the 1866 Civil Rights Act is touching, but we will be hornswoggled if we can see how it remotely applies to the conduct of the Petitioner in procuring the discriminatory contract in this case.

The right of freedom of contract on the part of blacks was valiantly defended by the Petitioner in its earlier dealings with the all black International Association of Railway Employees. Petitioner gallantly carried out contracts by the Association which caused Negro firemen to receive a lower rate of pay than white firemen, to receive less fringe benefits or welfare benefits than the whites, etc. (R. 615-616). This freedom of contract on the part of Negroes, whereby they were grossly discriminated against in favor of whites were kept in effect by Petitioner until an integrated union became the bargaining agency for the Negro firemen (R. 613-614).

In conclusion, it may not be amiss to point out that many of the members of the I.A.R.E. did not consider that their general chairman was properly exercising their "right of freedom of contract" when he said he was going to sign the agreement whether they wanted it or not (R. 481). The opposition to the chairman's action became hostile and angry (R. 482), and Mr. Simpson was gotten rid of because there would have been trouble otherwise (R. 483). While Respondents did not attack the authority

of Simpson to execute the contract, the background presented does shed light on the contentions of the Petitioner under this point.

CONCLUSION

The Petition having failed to show special and important reasons for granting the Writ, we respectfully urge that it be denied in all things.

Respectfully submitted,

JONES, JONES & BALDWIN
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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief Opposing Writ of Certiorari, was this the ..... day of ....., placed in the United States Mail, addressed to Mr. James Pope Simpson, 1507 Pacific Avenue, Room 900, Dallas, Texas 75201, Attorney of Record for Petitioner, Missouri Pacific Railroad Company.

/s/ FRANKLIN JONES
Of Counsel